CORRESPONDENCE

THE REPORTS OF GRAND JURIES—THEIR NATURE AND SCOPE

(Having special reference to the investigation of recent Election Frauds in Richmond City)

To the Editor of the Virginia Law Register:

The matter you ask me to write on is "The Reports of Grand Juries, Their Nature and Scope, having reference to the recent controversy." I understand you, of course, to refer to the recent investigation in the Hustings Court of Richmond City of the primary election and Judge Witt's refusal to receive the report of the minority of the grand jury. I have been, and am, so overloaded by the labors that investigation has imposed upon me, that I have been unable to give to the subject such an investigation as its importance demands; but if you are content with a *currente calamo* article I will jot down a few reflections that have occurred to me.

The true question, it seems to me is: Has the grand jury a right to make reports to the court on matters that seem important to it, or is it confined in its functions to finding indictments? For, if the grand jury has a right to make reports, then it surely can make no reports that its members do not agree to without stating that the report is not unanimous. The grand jury cannot report an untruth and say to the court that the grand jury report so and so when some of its members refuse to assent to those conclusions. If the grand jury may report, then those members who do not assent to the report, must, in the nature of things, have the right to say, "that is not our conclusion in the matter, but this is our conclusion." It seems to me this is too obvious to justify further comment. I am asked though if it can be possible that the minority can say to the court that they do not concur in an indictment? I can see no reason why they should not do so, but as the statement would be an entirely vain one the court might very well say it declined to receive it as being a totally useless document. But that would not be the case with a minority report giving important information.

In his 4th volume at p. 302, Blackstone, quoting 2 Hale's P. C., gives the common law writ for summoning the grand jury. The officer is to summon them "to inquire, present, do and execute all those things which on the part of our Lord the King shall then and there be commanded them to do." They are not summoned to find indictments, but to "do and execute ALL those things" which may be given them in charge.

Suppose there was an act of Parliament providing that the judge should remove all negligent jailers, but that negligence in jailers should not be a crime. Is it to be said that under the exigencies of this writ the Judge could not charge the grand jury to inquire and report whether the jailers had been negligent?

This writ teaches us what the common law expected of the grand juries. They were to be the grand inquest to inquire into whatever concerned the peace and order of the kingdom, and make the report to the court of what, in their judgment, the peace and order of the kingdom required. They

were to "do and execute" WHATEVER concerned the interest of the king in his quality of *parens patriae.*

Now when Judge Witt charged his grand jury he used the following language:

"Gentlemen of the Grand Jury: The report of the regular grand jury made to this court last week, concerning the manner of conducting the recent primary election held in the city of Richmond was of such a gross character that the court has deemed it proper to convene you again in special session.

"That investigation, so fully and fearlessly conducted by you, has naturally left this community in a state of unrest and grave suspicion.

"No men are more suited to this task than you. Your familiarity with the investigation up to the point at which your report was made will the better fit you for the duty which will be imposed upon you.

"The honesty and fairness of the election returns is the sole question which will be the subject of your inquiry.

"I charge you, therefore, to give this most important matter your earnest attention and fullest investigation, so that you may report not only when and where fraud has been committed, but also what officers have faithfully discharged their duties, for while the law requires that the guilty man shall be punished, justice demands that the honest man shall be freed even from the suggestion of evil and wrongdoing. . . . "

This is an explicit command to the grand jury to report upon the election as well as to find indictments against those who had violated the law, and, in giving this instruction Judge Witt was complying with the letter and the spirit of what the common law expected of the court. And the grand jury, in reponding to the court's charge by a report in addition to their indictments was complying literally with what the common law expected them to do. But, if some of its members did not agree to the view a majority took of the matter, the right to report involved their right to say they did not agree to the report.

In the Richmond case the grand jury made a report on the election additional to the indictment found by it. These members asked leave to present a separate report but the judge refused to receive it, and afterwards in court forbade them to publish it. If he did not receive it, it seems to me he had no jurisdiction over it and could give no order in the premises. After court adjourned and he was at Milboro, these grand jurors again applied for leave to publish it and he refused the permission. It seems to me that being out of court he had no authority to make any order in the premises. They could publish upon their own responsibility.

It seems clear to me that the foregoing is the status of the matter at common law. Have our statutes changed the common law? It seems to me that instead of appealing any part of it they are simply in aid of it, for it must be remembered that the settled rule of construction is that a statute will never be allowed to go deeper into the common law than its express terms require. *Milhiser Mfg. Co.* v. *Gallego Mills Co.*, 101 Va. at p. 595.

Sec. 3982 of the Code commands the judge to charge the grand jury leaving to him entirely the subjects upon which he will charge them. Sec. 3980 prescribes the grand juror oath.

It requires him to make true presentment of ALL such matters as are given him in charge or come to his knowledge touching the present service and it requires him to present the truth, THE WHOLE TRUTH and nothing but the truth. This is really nothing but the common law oath, and is of very ancient origin. 5 Eng. Rep. 607, *Brown* v. *the State*. For the oath itself see 1 Archbold's Criminal Pleading 165 (Marg.)

Sec. 3983 requires the grand jury to enquire of and present all felonious misdemeanors and violations of penal laws within the jurisdiction of the court.

Now every provision of each one of these sections was also a provision of the common law. Is it to be said that the legislature, in re-enacting these provisions of the common law intended to deprive the grand jury of other functions conferred upon it by the common law? To hold so is to violate distinctly the rule of construction just quoted.

The following note is to be found at page 1088 of the 2 volume of Burrows' Reports *tempore* Lord Mansfield 1760:

"This being grand jury day, it was intended by the sheriff and pressed by the two knights of the shire for Middlesex that *all* the principal gentleman of the county (not fewer than fourscore in number) should be sworn on this grand jury, in order to their being included in an address to his Majesty, from and in the name of the grand jury of Middlesex upon his accession to the Crown. But upon the sheriff's mention of this to me, it seemed to me irregular and improper to swear more than 23. Because if a number amounting to *two full* juries or more could be sworn, it might happen that a complete jury of twelve might find a bill to be a true one, though other twelve, or even more than twelve of the very same jury might reject it as an untrue one; which would be inconvenient as well as contradictory, and even somewhat absurd and ridiculous. Lord Mansfield, upon being apprised of this, said it would be monstrous to swear fourscore; and that the officer could not properly swear more than three and twenty."

Here is distinct evidence that it was understood by everybody in 1760 that the grand jury had other functions than that of finding indictments, and Lord Mansfield, one of the greatest common law lawyers that ever lived, expressed no disapprobation of what the grand jury proposed to do when informed of it.

I have heard but one argument that I thought worth notice against the right of the grand jury to make reports and that is that it would license them to libel citizens. But this argument begs the whole question. If the law permits it to make reports then it is idle to say these reports may libel the citizen. *Solus populi suprema lex.* There are many cases in which the law permits the citizen to be libelled. If in the trial of an action, Smith swears that he saw Jones steal a pocket book from Brown on July 1st at the corner of 5th and Broad streets, Richmond, a newspaper may safely print this statement although in point of fact Jones was actually in London on that day and the statement is a gross libel upon him. The public right requires that actions must be tried, and the citizen's right to exemption from libel must yield to that public right.

If there were anything in this argument it would equally forbid the grand jury to find any false indictment.

For a false indictment libels the accused as much as a false report can. But what would grand juries amount to if they found false indictments at their peril?

It may be said that the accused can force the trial of a false indictment and prove his innocence. But the fact that he was indicted has gone over the land and many hear of it who never hear of his acquittal, while many who hear of his acquittal say it was upon technical grounds only.

The right to find false indictments involves the right to make false reports if reports are really one of the functions of the grand jury.

The grand jury of to day is the product of evolution. It is far from being the original grand jury. Originally, if a grand juror disclosed testimony before it he made himself guilty of the crime with which the accused was charged. 4 Blackstone p. 126. Originally the accusation by the grand jury was itself a conviction of the crime. See this whole subject most elaborately and philosophically discussed by Mr. Justice Stanley Mathews in *Hurtado* v. *California*, 110 U. S. R. 516. At page 530 he says:

"When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our 'ancient liberties.' It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptations to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self government."

This is a distinct recognition by the Supreme Court of the United States that the grand jury falls under the influence of the principles of evolution and is to be suited to our new form of development, as well as all of our other institutions. Reports by grand juries upon what they think it is important the court should know can be of incalculable public service. The second grand jury in the Richmond case was called, as the charge quoted shows, because of the report made by the first one. The true question is shall the public be deprived in this day of evolution of this invaluable source of safety when there is absolutely no valid reason why it should be? The majority may refuse to indict. But why should not the minority say to the Court we have seen and heard enough to require that this matter should be further investigated.

Is there not, after all, a good deal of sentiment and humbuggery about this whole matter?

The function of the grand jury is to pry into everything that concerns the public interests and find out whether the rights and interests of the people are being interfered with, and, if they are, to let the court know that all of us are being mistreated by selfish persons who are not willing to play the game of life fairly and squarely.

When the court has this information it knows what to do to see that the public is fairly treated; but the court cannot know this without the aid of the grand jury. Are we not all deeply interested to see that the grand jury has the very fullest and broadest powers that will enable it to give the court this information? No one can be hurt by the court being informed of misdeeds. Criminals only are benefited by useless shields interposed between them and justice.

WM. L. ROYALL.

EVIDENCE AS TO FAILURE TO WARN INFANT SERVANT—
A CRITICISM OF THE RECENT CASE OF VA. IRON &C. CO. V. TOMLINSON

Editor of the Virginia Law Register:

Sir:— I wish to call attention to a recent ruling of the Court of Appeals. In the case of the *Virginia Iron etc. Co.* v. *Tomlinson*, 51 S. E. 362, 11 V. L. R. 374, it was held that in an action for the death of an infant servant, in which it was charged that the master had not given warning of danger, evidence by other employees that they had never heard the foreman give any instruction to any one as to the danger was not admissible.

The Court cited no authority for this ruling and all that was said upon the point was contained in the following paragraph:

"While it was the duty of the defendant company to instruct the decedent and the boys working with him as to the dangers of the machinery by which they were surrounded, yet such instructions were not required to be given at any particular time and place. That being the case, the fact that the witnesses whose evidence is under consideration did not hear such instructions given does not tend to prove with any degree of probability that no such instructions were given. The evidence was therefore inadmissible."

It will be noticed that the plaintiff, upon the issue joined, had the burden to prove a negative allegation,—"that notice of the danger was *not* given to the employee. "The Court held that other employees who said "they were in a position where they would have been likely to have heard any such instruction, if given," could not be allowed to testify that they never heard the foreman or any other boss of the defendant company give any instructions to the boys working where decedent worked as to the danger of the machinery, where he was killed.

"To this general rule, that the burden of proof is on the party holding the affirmative, there are some exceptions, in which the proposition, though negative in its terms, must be proven by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of this negative is an essential element in his case; as, for example, in an action for having prosecuted the plaintiff maliciously and without probable cause. Here, the want of probable cause must be made out by the plaintiff, by *some affirmative proof* though the proposition be negative in its terms. 1 Greenl. Ev., sec. 78.